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No. 73-511

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In the Supreme Court of the United States

OCTOBER TERM, 1973

INDIANA AND MICHIGAN ELECTRIC COMPANY,
PETITIONER

v.

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; AND FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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1. Petitioner seeks review of the decision of the court of appeals in this case (Pet. App. 1a-23a) reversing orders of the Federal Power Commission (Pet. App. 28a-49a) in which the Commission, pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, accepted for filing and suspended for five months revised tariff sheets submitted by petitioner. These revised tariff sheets increased the rates at which petitioner sells electricity on a wholesale basis to several of its jurisdictional customers, including respondents Anderson Power and Light of the City of Anderson, Indiana (Anderson) and Richmond Power and Light of the City of Richmond, Indiana (Richmond).

At the time the revised sheets were tendered to the Commission for filing, respondents Anderson and Richmond intervened and filed motions to reject the filing. They claimed that their contracts with petitioner did not permit unilateral rate increases and that the filing should therefore be rejected under this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 322, and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348.[1] The Commission denied these motions on the ground that the contracts in question were not fixed-rate contracts (Pet. App. 35a).

Both Anderson and Richmond applied for rehearing of the Commission's decision, again asserting that petitioner's filing was barred by contract. They relied upon contractual language that ties their rates to the rates set forth in petitioner's "Tariff I.P."[2] on file with the Indiana Public Service Commission, and they argued that this language prohibits petitioner from raising their rates above those established in the currently effective Tariff I.P. The Commission denied rehearing (Pet. App. 39a-40a). It stated (Pet. App. 40a):

> This Commission has exclusive jurisdiction over I & M's wholesale sales to Anderson and R P & L, and I & M is obligated to charge those rates which

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[1] Motions to reject on contractual grounds were also filed by several of petitioner's rural electric cooperative customers who were affected by the new rate filing. These customers instituted separate proceedings to review the Commission's action in this matter, which are currently pending *sub nom. Indiana Statewide Rural Electric Cooperative, Inc.* v. *Federal Power Commission*, C.A. D.C., No. 72-2148, filed December 1, 1972.

[2] Petitioner serves several retail industrial customers in Indiana under Tariff I.P.

> are on file with this Commission. This Commission's jurisdiction cannot be * * * limited or avoided by private contract. * * * For service subject to this Commission's jurisdiction, the Tariff I.P. on file with the Indiana Public Service Commission is not applicable. We find that the contracts do not preclude the filing of Rate Schedule WS to supersede Tariff I.P. on file with this Commission.

On petitions for review, the court of appeals concluded that petitioner's filing was inconsistent with its contracts with Anderson and Richmond and thus should have been rejected by the Commission under *Mobile* and *Sierra*. Accordingly, the court remanded the case to the Commission with directions to reject the filing and to take appropriate action to secure refunds of the incremental amounts paid by Anderson and Richmond since the time the new tariff sheets had been erroneously allowed to become effective (Pet. App. 23a).

The court recognized that neither of the contracts here prohibited unilateral rate increases (Pet. App. 8a-9a, 19a-20a). As to Richmond, however, the court reasoned that, since the contract was entered into at a time when both parties were aware of federal jurisdiction over the sale, the term tying the rate to that in Tariff I.P. represented an intent by the parties that petitioner's right to file increases be limited only to those increases necessary to keep Richmond's rate identical to that in Tariff I.P. (Pet. App. 14a-15a). Citing this Court's decisions in *Mobile*, *Sierra*, and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, the court found that this "contractual undertaking" was as "deserving of protection under the Act" as "one for a single fixed rate" (Pet. App. 15a).

As to Anderson, the court reasoned that, since the contract was entered into when both parties assumed that only the State had jurisdiction over the sale, the parties must have contemplated rate increases only in accordance with Indiana law (Pet. App. 19a-20a). Under that law, a rate increase cannot become effective until approved by the Indiana Public Service Commission after formal hearing. The court concluded that the contract should therefore be read to prohibit petitioner from increasing its rate unilaterally simply by filing a new tariff as it had done here (Pet. App. 21a-22a).

The court found support for its interpretation of the contracts in Richmond's "plausible explanation" (Pet. App. 12a) of why the parties had agreed to link their rates to those approved by the Indiana Public Service Commission under Tariff I.P. Since both Anderson and Richmond compete with petitioner for industrial customers, and since Tariff I.P. governs petitioner's rates to some of its retail industrial customers, keying the rates to those in Tariff I.P. would permit Anderson and Richmond to offer to industrial customers rates that would be competitive with those offered directly by petitioner (Pet. App. 12a-13a, 22a).

2. The Commission agrees generally with petitioner that the court of appeals erred in substituting its interpretation of the contracts for that of the Commission. The result—which could hardly have been contemplated by the parties to the contracts—is that the Indiana Public Service Commission in effect has authority to regulate sales of electricity which, under the Federal Power Act, are committed to the exclusive regulatory jurisdiction of the Federal Power Commission.

The only issue in this case, however, concerns the correct interpretation of the particular language in the two contracts, and that issue is not of sufficient general importance to warrant review by this Court. The decision below will not, in the Commission's judgment, seriously interfere with the performance of its regulatory responsibilities under the Federal Power Act. As the court below recognized (Pet. App. 15-16), the Commission remains free to initiate a proceeding under Section 206(a) of the Act, 16 U.S.C. 824e(a), to determine whether the rates under the contracts—*i.e.*, the rates under Tariff I.P.—are "unjust, unreasonable, unduly discriminatory or preferential * * *." If the Commission so determines, it may by order fix "just and reasonable" rates for the sales.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

LEO E. FORQUER,
General Counsel,
GEORGE W. MCHENRY, JR.,
Solicitor,
JOHN R. STAFFIER,
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NOVEMBER 1973.